

**WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**  
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**File No.: 14148.00082**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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BARRY J. BRETT and LESLIE BRETT,

Plaintiff, Docket No.: 15-cv-2921

-against-

**VERIFIED ANSWER**

44<sup>th</sup> STREET RESTAURANT LLC d/b/a  
DB Bistro Moderne,

Defendant.

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Defendant, 44<sup>th</sup> STREET RESTAURANT LLC d/b/a DB Bistro Moderne, answering the Complaint of plaintiffs, BARRY J. BRETT and LESLIE BRETT, by their attorneys, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, respectfully alleges, upon information and belief, as follows:

**AS AND FOR AN ANSWER TO THE PARTIES**

1. Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered "1", and "2" of the Plaintiff's Complaint.

2. In response to paragraphs designated "3" and "4", Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, admits that it is a domestic Limited Liability Company and does not contest the jurisdiction of this court.

3. Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, admits upon information and belief each and every allegation contained in the paragraphs of the Plaintiff's complaint designated "5" and "6".

4. Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, denies each and every allegation contained in paragraph numbered "7" of the Plaintiff's Complaint to the extent that the term "maintained" is vague and undefined in the context of this allegation.

**AS AND FOR AN ANSWER TO JURISDICTION AND VENUE**

5. In response to paragraph designed "8", the answering defendant repeats, reiterates and realleges each admission or denial previously set forth herein in response to Paragraphs "1" through "7" of the Complaint with the same force and effect as if set forth at length herein.

6. Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, denies each and every allegation contained in paragraph numbered "9" of the Plaintiff's Complaint.

7. Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered "10" and "11" of the Plaintiff's Complaint.

**AS AND FOR AN ANSWER TO THE UNDERLYING FACTS**

8. In response to paragraph designed "12", the answering defendant repeats, reiterates and realleges each admission or denial previously set forth herein in response to Paragraphs "1" through "11" of the Complaint with the same force and effect as if set forth at length herein.

9. Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered "13", "15" and "16" of the Plaintiff's Complaint.

10. Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, denies each and every allegation contained in paragraphs numbered "14", "17", and "18" of the Plaintiff's Complaint.

**AS AND FOR AN ANSWER TO THE FIRST CLAIM FOR RELIEF BY**  
**PLAINTIFF, BARRY J. BRETT**

11. In response to paragraph designed "19", the answering defendant repeats, reiterates and realleges each admission or denial previously set forth herein in response to Paragraphs "1" through "18" of the Complaint with the same force and effect as if set forth at length herein.

12. Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, denies each and every allegation contained in paragraphs numbered "20", "21", and "22" of the Plaintiff's Complaint.

**AS AND FOR AN ANSWER TO THE SECOND CLAIM FOR RELIEF BY**  
**PLAINTIFF BARRY J. BRETT**

13. In response to paragraph designed "23", the answering defendant repeats, reiterates and realleges each admission or denial previously set forth herein in response to Paragraphs "1" through "22" of the Complaint with the same force and effect as if set forth at length herein.

14. Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, denies each and every allegation contained in paragraphs numbered "24", "25", "26", "27", and "28" of the Plaintiff's Complaint.

**AS AND FOR AN ANSWER TO THE THIRD CLAIM FOR RELIEF BY**  
**PLAINTIFF BARRY J. BRETT**

15. In response to paragraph designed "29", the answering defendant repeats, reiterates and realleges each admission or denial previously set forth herein in response to

Paragraphs "1" through "28" of the Complaint with the same force and effect as if set forth at length herein.

16. Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, denies each and every allegation contained in paragraphs numbered "30", "31", "32", and "33" of the Plaintiff's Complaint.

**AS AND FOR AN ANSWER TO THE FOURTH CLAIM FOR RELIEF BY  
PLAINTIFF LESLIE BRETT**

17. In response to paragraph designed "34", the answering defendant repeats, reiterates and realleges each admission or denial previously set forth herein in response to Paragraphs "1" through "33" of the Complaint with the same force and effect as if set forth at length herein.

18. Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "35" of the Plaintiff's Complaint.

19. Defendant, 44<sup>th</sup> STREET RESTAURANT d/b/a DB Bistro Moderne, denies each and every allegation contained in paragraphs numbered "36" and "37" of the Plaintiff's Complaint.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

20. Any damages complained of by Plaintiffs and were caused in whole or in part by the conduct or negligence of others not including the answering Defendant.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

21. If the Plaintiffs incurred any damages as alleged in the Complaint, Plaintiffs assumed the risk inherent in the activity in which they were engaged at the time any damages were incurred.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

22. If the Plaintiffs incurred any damages as alleged in the Complaint, Plaintiffs incurred such damages as a result of comparative and/or contributory negligence of the Plaintiffs without any negligence, strict products liability or breach of warranty on the part of the answering Defendant. That any damages to which Plaintiff may become entitled should be diminished in the same proportion as Plaintiffs own negligence and/or culpable conduct bears to the total negligence and/or conduct responsible for the damages sustained.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

23. The answering Defendant asserts that if this action is subject to Article 16 of the CPLR that in accordance with the limitations of joint and several liability in Article 16 of the CPLR, the answering Defendant cannot be held liable in excess of its proportionate share of liability.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

24. Plaintiffs, or their agents, could have, but failed to, perceive the defect, as alleged in the Complaint, or was otherwise contributory negligent, and Plaintiffs are therefore barred from recovery herein in whole or in part.

**AS AND FOR AN SIXTH AFFIRMATIVE DEFENSE**

25. Upon information and belief, the acts or omissions giving rise to the damages or losses alleged were those of a third party or parties for which the Defendant is in no way liable or responsible.

**AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

26. Upon information and belief, the damages and occurrences alleged in the Complaint were the result of an independent and intervening cause or causes of which the answering Defendant had no control or in any way participated.

**AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE**

27. In the event that any person or entity liable or claimed to be liable for the injury alleged in this action has been given or may thereafter be given a release or a covenant not to sue, the answering Defendant will be entitled to protection and the corresponding reduction of any damages which may be determined to be due against the Defendant.

**AS AND FOR A NINTH AFFIRMATIVE DEFENSE**

28. That any cause of action premised upon breach of warranty is barred by application of N.Y.U.C.C. Law §607,et. Seq.

**AS AND FOR A TENTH AFFIRMATIVE DEFENSE**

29. The claim alleged against Defendant fails to state a cause of action upon which Plaintiffs can recover.

**AS AND FOR A ELEVENTH AFFIRMATIVE DEFENSE**

30. The court should not proceed in this action in the absence of an entity which should be a party.

**AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE**

31. The Plaintiffs are not entitled to recover from the Defendant due to its own, active and affirmative, wrongful, improper, illegal and inequitable conduct.

**AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE**

32. Plaintiffs failed to mitigate, obviate, diminish or otherwise act to lessen or reduce the injuries and/or damages alleged in the Complaint.

**DEMAND FOR TRIAL BY JURY**

WHEREFORE, Defendant **44<sup>th</sup> STREET RESTAURANT LLC d/b/a DB Bistro Moderne** demands a trial by jury for all claims and issues in this action for which these Defendants are or may be entitled to a jury trial.

WHEREFORE, Defendant, **44<sup>th</sup> STREET RESTAURANT LLC d/b/a DB Bistro Moderne**, demands judgment dismissing Plaintiffs' Verified Complaint together with costs and disbursements of this action, or, in the alternative, that the relative of responsibility of all parties be apportioned, and for such other further relief as this Court deems just and proper.

Dated: White Plains, New York  
June 15, 2015

**WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP**

By: \_\_\_\_\_

John D. Morio  
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